either be dismissed or stayed (pending disposal of the cross-claim).

Accordingly as the two judgments on which KSY initially founded its right to be a supporting creditor have turned out to be not a sound basis and as the right to the agreed lump sum had not crystallized prior to the date of presentation of the petition herein and in any event as the debtor has a substantial cross-claim against KSY in my judgment KSY cannot be recognized in this petition as a supporting creditor. There will be an order in terms of the motion encl (72).

Order accordingly.

Solicitors: *Allen & Gledhill; Murthi & Partners; EU & Tang; Shearn Delamore & Co; Mah Weng Kwai & Associates.*

Reported by *Wong Kim Fatt*

UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors

HIGH COURT (KUCHING) - CIVIL SUIT NO KG 412 OF 1986
HAIDAR J
20 MAY 1989

Civil Law Act - Assignment - Right to commence action only when complied with provision of the statute - Statement of claim failed to plead facts to bring case within statute relied on - Whether supplemental affidavit could remedy failure - Civil Law Act (Rev 1972), s 4(3)

Civil Procedure - Pleadings - Statement of claim failed to plead facts to bring case within statute relied on - Whether supplemental affidavit could remedy failure

Civil Procedure - Summary judgment - Form not strictly in compliance - Whether omissions or defects prejudicial - Technical errors - Delay in making application for summary judgment - Whether delay was inordinate

Civil Procedure - Further arguments - Whether new grounds can be raised - Rules of the High Court, O 56 r 2(2)

The plaintiffs' claim was in respect of a guarantee executed by the second defendant who was the director of the first defendant company. The first defendant company had entered into nine hire-purchase agreements in respect of bulldozers and the plaintiffs recommended and introduced the first defendant company to Mayban Finance Bhd ('MFB') for financing. MFB agreed to purchase the bulldozers and then hired them to the first defendant company. The second and third defendants entered into a guarantee of the hire-purchase.

By a dealer's master agreement between MFB and the plaintiffs, the plaintiffs agreed to indemnify MFB for all losses suffered as a result of any agreement entered into between MFB and third parties in respect of any equipment sold by the plaintiffs and financed by MFB. The first defendant defaulted and the bulldozers were repossessed and sold. MFB demanded payment from the plaintiffs in accordance with the dealer's master agreement. The plaintiffs paid $970,048.17 to MFB and MFB assigned to the plaintiffs all its rights, title and interest in the hire-purchase agreements and the guarantee.

The plaintiffs obtained judgment in default of appearance against the first and third defendants and applied for summary judgment against the second defendant. The application was allowed but the second defendant's counsel applied under O 56 r 2(1) for further arguments. The second defendant raised several arguments and contended that the application ought to be struck out as (i) there was a failure to comply strictly with Form 62; (ii) the plaintiffs must depose that they verily believe that there was no defence to the action; (iii) that the application should be taken out promptly; (iv) the affidavits filed did not disclose the place of residence or occupation of deponents nor the grounds or source of information; (v) there was defective notice of demand; (vi) there was misrepresentation by the plaintiffs; (vii) the claim was based on the variation agreement and not the hire-purchase agreements; (viii) there was no notice of assignment given to the second defendant.

Held, granting the second defendant leave to defend:

(1) The plaintiffs did not plead in the statement of claim the notice of the assignment. In order to claim a right created by statute, every necessary fact must be alleged to bring the case within the statute. The supplemental affidavit deposing that the notice of assignment had been served on all the defendants cannot make good any defect or omission in the statement of claim.

(2) The second defendant had filed his defence on 20 December 1986 and summary judgment was applied for some ten months later. The application must be made after appearance has been entered and could be made either before or after the delivery of defence provided that where it was made after delivery of defence, the plaintiffs must explain the delay. If the explanation is not accepted, summary judgment cannot be signed. The plaintiffs had not made any explanation and ten months was inordinate delay.

(3) Failure to comply strictly with the form was not fatal so long as the form was substantially in compliance and the defendants were not in any way prejudiced. In any event, the defect was minor and purely technical and was only an irregularity.

(4) The purpose of further arguments is to give the judge an opportunity to reconsider the order he has made in the somewhat hurried circumstances of a hearing in chambers on a chambers day. If counsel are precluded from relying on grounds other than those advanced, then there is really no useful purpose of hearing the matter under O 56 r 2(2) and would be a sheer waste of the court's time. The further argument is not an appeal where the appellant will have to confine himself within the bounds of the petition filed unless leave of court is obtained.

Cases referred to

1 *Shanghai Hall Ltd* v *Town House Hostel Ltd* [1967] 1 MLJ 223 (folld)
2 *Mok Hin Wah & Ors* v *United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (distd)
3 *Comfort* v *Betts* [1891] 1 QBD 740 (refd)
4 *United Malayan Banking Corp Bhd* v *Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (folld)

5 *Krishnamurthy & Anor* v *Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (folld)

Legislation referred to
Civil Law Act 1972 s 4(3)
Rules of the High Court 1980 O 14, O 56 r 2(2)

Baru Bian for the plaintiffs.
Ting Sing Chuan for the second defendant.

Cur Adv Vult

Haidar J: This is an application (encl 29) by the plaintiffs, UMW (Sarawak) Sdn Bhd ('UMW') for judgment under O 14 of the Rules of the High Court 1980 against the second defendant only as judgment in default of appearance had been entered against the first and third defendants on 7 February 1987 (encl 14) and 17 September 1987 (encl 27) respectively. The application is supported by the affidavit of Bong Joon Fook, the credit control executive.

After hearing counsel for both parties on 11 November 1988 I allowed the application of UMW on 6 December 1988. The second defendant's counsel applied under O 56 r 2(2) for further argument and I allowed the application and heard the further argument on 19 April 1987 wherein I reserved my judgment. I now proceed to give my judgment.

The claim of UMW is in respect of a guarantee given by the second defendant for nine hire-purchase agreements for nine Komatsu bulldozers, with the option to purchase same, entered into by the first defendant. It is not disputed that the second defendant is a director of the first defendant company. The sum claimed is $1,046,178.31 for the default in the monthly instalments by the first defendant in respect of the bulldozers and the bulldozers had since been repossessed by Mayban Finance Berhad ('MFB').

UMW recommended and introduced the first defendant to MFB for financing of the bulldozers. MFB agreed to purchase the bulldozers from UMW and MFB then hired the bulldozers to the first defendant under nine separate hire-purchase agreements dated 30 January 1982 (exh AT2(i)-(ix)). In other words exhs AT2(i)-(ix) were entered into between MFB and the first defendant. In addition thereto, it is alleged that the second and third defendants entered into a guarantee of hire-purchase agreement on the same date with MFB (exh AT3). However, by a dealer's master agreement dated 13 May 1981 made between MFB (formerly known as Malayan Finance Corporation Berhad) and UMW, UMW agreed to indemnify MFB against all loss suffered by MFB as a result of any agreement entered into between MFB and any third party in respect of any equipment sold by UMW and financed by MFB under such agreement. (See exh AT1). The bulldozers that were repossessed by MFB (see exh AT 5(i)-(ix)) were sold and MFB demanded from UMW to indemnify MFB in respect of the sum owing to MFB by the first, second and third defendants in accordance with the dealer's master agreement. UMW accordingly, on 19 December 1985 paid to MFB the sum of $970,048.17, as claimed (see exh AT6). By ten separate agreements in writing dated 10 July 1986 MFB assigned absolutely to UMW all its rights, title and interest in respect of the said hire-purchase agreements and the said guarantee. (See exhs AT 7(i)-(ix)). Earlier on, that is, on 4 September 1984 the first defendant entered into nine variation agreements (see exhs AT 4(i)-(ix)) with MFB and so did the second and third defendants as guarantors as the first defendant was unable to meet the rent payable by the instalments and at times specified under the hire-purchase agreements subject to the condition that the hire-purchase agreements shall remain in force and effect as modified thereby and MFB's acceptance of or consent to the defendant's request shall not operate as a waiver of any of MFB's rights or remedies.

In addition to the affidavit of Bong Joon Fook (encl 14), the plaintiffs filed two additional affidavits through Bong Joon Fook (encl 32) and Lee Tiong Seng (encl 33). Suprisingly, the second defendant did not file any affidavit to oppose the O 14 summons. However, according to the Federal Court case of *Shanghai Hall Ltd* v *Town House Hotel Ltd*[1] at p 224, Raja Azlan Shah J (as he then was) said:

> The appellants did not file any affidavit. Pausing here for a moment, I agree with the learned judge that omission to file an affidavit in reply was not fatal to the appellants' case as they were not obliged to do that.

It would, however, I think, be of assistance to the court and may well be to UMW also to understand the grounds of objection if an affidavit in opposition is filed but in view of the decision of the Federal Court I should not take issue with such an omission.

At the outset of the hearing of the further argument, Mr Ting, counsel for the second defendant, raised some irregularities in respect of the application of the plaintiffs and hence contended that the application should accordingly be struck out.

Firstly, he said that no grounds in support are stated as required by O 32 r 1 as not being in compliance with Form 62. In my view the failure to comply strictly with Form 62 as in this case, is not fatal so long as the said Form is substantially complied with and the second defendant is not in any way thereby prejudiced and such a defect, in any event, is minor and purely technical and is an irregularity only (see O 2 r 1(1)). He went on further to say that in an O 14 summons the plaintiffs must depose that they verily believe that there is no defence to the action. A look at the affidavit of Bong Joon Fook (encl 29) at para 19 would show that such allegation was baseless. He then

went on to say that an O 14 summons must be made promptly and not ten months as in this case and in any event submitted that UMW must set forth the grounds for such delay. I will deal with this issue later in my judgment.

Secondly, he contended that the affidavits filed did not disclose the place of residence or occupation of the deponents under O 41 r 1(4) and further did not state the grounds and source of information. I am unable to accept such a contention as an examination of the affidavits will show of sufficient compliance and there is therefore no substance in such a contention.

Another issue which I think is without merit is as regards the alleged defect in the notice of demand by UMW. In support thereof, counsel for the second defendant cited the Supreme Court case of *Mok Hin Wah & Ors* v *United Malayan Banking Corp Bhd.*[2] The counsel is in error here as in this case the notice of demand cum notice was addressed to all the defendants by UMW (see exh BB2 annexed to the affidavit of Lee Tiong Seng - encl 33). The facts in this case are distinguishable from the facts of *Mok Hin Wah's* case[2] as in the said case, carbon copies of the notice were received by the guarantors and clearly therefore the case of Mok Hin Wah, is inapplicable in this case.

I am also unable to accept the submission of counsel for the second defendant about the allegation of misrepresentation in regard to the guarantee given by him as the exhibits AT2 and AT3 clearly show the capacities in which he signed the documents. In any event Lee Tiong Seng in his affidavit (encl 33) deposed at para 3 thereof that he has explained to the second defendant the contents and the legal effect of the hire-purchase agreements and the guarantee agreement and this deposition remained uncontroverted by the second defendant. In fact Lee Tiong Seng was a witness to the signature of the second defendant in the said documents. Further, the allegation of the second defendant's counsel that the claim of UMW appears to be based on the variation agreement is devoid of merit as firstly such ground was not pleaded in the defence and secondly, cl 2 of the variation agreement clearly stipulates and was agreed to by the second defendant that the hire-purchase agreements shall remain in force. Clause 2 reads:

> That the said agreement shall remain in force and effect except as hereby modified and your acceptance of or consent to this request shall not operate as a waiver of any of your rights or remedies in respect of any act or omission or breach other than my/our omission to pay rent by the instalments and at the times set out in the said agreement.

The only other issue (apart from the delay of the O 14 summons) that merits consideration is as regards to the assignment of the debt by MFB to UMW where it was alleged that no notice of such assignment was given to the second defendant. It is also not so pleaded in the statement of claim of UMW. The second defendant by para 7 of his defence averred that no notice of such assignment has ever been given in writing or at all by UMW to him. According to *Odgers on Pleading and Practice* (20th Ed) at p 97:

> Whenever the right claimed or the defence raised is the creature of statute, being unknown to the common law, every fact must be alleged necessary to bring the case within the statute.
>
> When the right claimed or the defence raised existed at common law, but the common law applicable to the case has been materially altered in its substance by statute, all facts are material which tend to take the case out of the rule at common law and bring it within the statute.

In this respect s 4(3) of the Civil Law Act 1956 (Rev 1972) (Act 67) is relevant. Section 4(3) reads:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law it existed in the State before the date of coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

The obvious question to ask is - has the provision of s 4(3) been satisfied. If it has there is no more a triable issue that needs to go for trial but if it is in the negative then clearly the second defendant has raised a triable issue that ought to go for trial. UMW by its para 17 of the statement of claim averred:

> By ten (10) separate agreements in writing dated 10 July, made between MFB of the one part and the plaintiff of the other part, MFB assigned absolutely to the plaintiff all the rights and benefits of the said hire purchase agreements and the said guarantee.

The instruments (AT 7(i)-(x)) clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word 'absolutely' in cl 1 thereof (see Fry LJ in *Comfort* v *Betts*[3]). It would appear therefore, by virtue of s 4(3) of the Civil Law Act 1956 UMW can sue alone if the debt be absolutely assigned to it by writing under the hand of the assignor (MFB), and express notice in writing of such assignment has been given to the debtor (the second defendant). According to *Odgers on Pleading and Practice* (20th Ed) at p 98:

> The statement of claim of such an assignee suing alone must expressly allege -
>
> (a) an absolute assignment;
> (b) in writing; and
> (c) notice of such assignment
> (d) given in writing to the debtor before the commencement of the action.

For without these averments the case is not brought within the statute and the plaintiff has no right to bring the action. (Emphasis added).

From the statement of claim of UMW it appears that (c) and (d) above are not satisfied in the sense that they were not so pleaded in order to constitute the right of UMW to bring an action against the second defendant. However, from the supplementary affidavit of Bong Joon Fook dated 6 July 1988 at para 8 thereof (encl 32) he deposed that notice of the assignment under the hire-purchase agreements and the guarantee agreement has been served on the first, second and third defendants and in support thereof exhibited the said notice as exh BB2. This to my mind amounts to an improvement of the statement of claim. In this respect Raja Azlan Shah Ag LP (as he then was) in *United Malayan Banking Corporation Berhad* v *Palm & Vegetable Oils (M) Sdn Bhd & Ors*[4] at p 20 said:

> As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted nor was the fact that the security had been realized in a series of sales of the shares between January and September 1980, and these matters were only disclosed for the first time in June 1981 in the affidavit in support of the O 14 summons. This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co* v *Parr* [1982] 2 QB 14, where Mathew J said that 'it is most important that a defendant should know from the writ what the exact claim against him is'.

Such being the case, in my view, the second defendant has successfully raised a triable issue and therefore ought to be given unconditional leave to defend and UMW's O 14 summons should be dismissed accordingly.

I will now finally deal with the issue of the delay in the filing of the O 14 summons by UMW. Mr Baru Bian, counsel for UMW, contended that the second defendant cannot now raise this issue which was not raised in the chambers hearing earlier on. Mr Ting, counsel for the second defendant, at first conceded but later in reply to Mr Baru Bian's submission, resiled on his earlier stand and argued that he should not be precluded from raising this issue as he contended that further argument hearing is a re-hearing. There is no authority to support his contention. However, *Mallal's Supreme Court Practice* (2nd Ed) at p 683 under 'Purpose of the Further Argument' it is stated that the application for further argument to be heard in open court is to give the judge an opportunity to reconsider the order he has made in the somewhat hurried circumstances of a hearing in chambers on a chambers day. Be that as it may, if there is a valid ground that was not raised in chambers, it should, I think, be allowed to be raised if was not deliberately omitted to be raised in chambers, as, for example, in this case where the counsels arguing in chambers and in open court are different. If the counsels are precluded from relying on grounds other than those advanced in the chambers hearing then, subject to the qualification as said by me earlier on, I do not really see the useful purpose of hearing the matter argued again in open court as provided under O 56 r 2(2) and it would be a sheer waste of the court's time. By way of analogy, the further argument hearing is not an appeal where the appellant will have to confine himself within the bounds of the petition as filed unless leave of the court is obtained. I would in the circumstances rule that Mr Ting is entitled to canvass this ground which I think is a valid one having regard to the facts.

According to Salleh Abas LP, in *Krishnamurthy & Anor* v *Malayan Finance Corporation Berhad*,[5] the law as to the time when an application for an O 14 judgment could be made is settled law. His Lordship at p 135 went on to say:

> The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed. This is the ratio decidendi in *McLardy* v *Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia* v *Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh* v *Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

In this case the second defendant entered appearance on 9 December 1986 and filed his defence on 20 December 1986. UMW took out the O 14 summons on 30 October 1987, some ten months later and nowhere in any of the affidavits in support of the said O 14 summons did UMW explain the delay. To my mind, ten months' delay can properly be termed 'inordinate' unless there are valid grounds. As an explanation was not even put forward by UMW for the inordinate delay in filing the O 14 summons, therefore no O 14 judgment can properly be given to UMW and it should accordingly be dismissed.

Assuming that I am wrong in my view above, I am of the opinion that it would suffice on the ground of the issue of assignment alone set out by me earlier for the second defendant to succeed in getting unconditional leave to defend this action.

I would accordingly set aside the earlier order I made in chambers. I therefore order that the O 14 summons be dismissed and the second defendant shall have the costs of this further argument hearing. The second defendant, in the circumstances, is given unconditional leave to defend this action.

Order accordingly.

Solicitors: *Anthony Ting & Co; Yong & Wong.*

Reported by *Yap Shao Sin*